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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 39978
)	
v.)	CARIBOU COUNTY NO. CR 2011-945
)	
MARK J. FIXMER,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CARIBOU

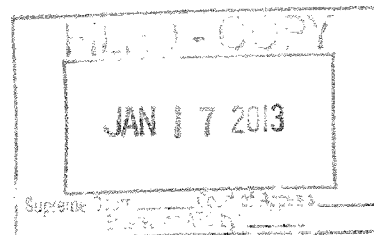
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STATEMENT OF THE CASE

Nature of the Case

Mark J. Fixmer appeals from the judgment of conviction following his guilty plea to possession of a controlled substance (methamphetamine). On appeal, he asserts that the district court abused its discretion when, without lawful authority, it imposed a fee of \$800 against him as "reimbursement to the Sixth District Court Fund for maintenance of the court," and when it imposed a unified sentence of six years, with three-and-one-half years fixed. Additionally, Mr. Fixmer asserts that the district court abused its discretion when it denied his Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion, in light of the new information provided in support thereof.

Statement of the Facts and Course of Proceedings

After waiving his right to a preliminary hearing (R., p.28), Mr. Fixmer was charged by Information with possession of a controlled substance (methamphetamine). (R., p.34.) Mr. Fixmer and the State then reached a plea agreement. The terms of the plea agreement were that, in exchange for Mr. Fixmer's plea of guilty to the charge, the State would "recommend nothing more harsh than the recommendation contained in the Presentence Investigation Report," and "[s]hould the PSI Report recommend actual prison time," the State would request a unified sentence of no more than five years, with two years fixed. (R., pp.44-45.) Pursuant to that agreement, Mr. Fixmer pled guilty. (Tr.Plea, p.13, L.19 – p.14, L.15.) A warrant was issued when Mr. Fixmer failed to appear for his sentencing hearing. (R., p.61.) Mr. Fixmer turned himself in on the warrant several days later. (PSI, p.11; R., p.64.)

At the sentencing hearing, defense counsel requested a unified sentence of five years, with two years fixed, and asked that the court retain jurisdiction. (Tr.Sent., p.13, Ls.9-15.) The State requested a unified sentence of seven years, with four years fixed, and asked that the court retain jurisdiction. (Tr.Sent., p.16, L.20 – p.17, L.18.) Ultimately, the district court imposed a unified sentence of six years, with three-and-one-half years fixed, and declined to retain jurisdiction. (Tr.Sent., p.33, Ls.5-20.) The district court also ordered the imposition of fines and fees as follows,

The court is going to impose a fine in the amount of \$400. *I'm going to impose \$800 of reimbursement to the Sixth District Court Fund for maintenance of the court.*¹ \$800 reimbursement to the Sixth District Court Fund for partial reimbursement of the public defender cost. \$100 reimbursement to the Idaho Department of Corrections [sic] for partial reimbursement of the presentence investigation report. *Court costs and victim compensation in the statutory amount.*

(Tr.Sent., p.33, L.21 – p.34, L.4 (emphases added).) The State did not seek restitution, and none was ordered. (Tr.Sent., p.34, Ls.5-7.)

Mr. Fixmer filed a Notice of Appeal timely from the judgment of conviction. (R., p.82.) Mr. Fixmer filed a Rule 35 motion (R., p.78), which he later supported with new information. (Rule 35 Information for Review Prior to Hearing (Augmentation); Supp.Tr., p.4, L.21 – p.6, L.24.) At a hearing on the Rule 35 motion, defense counsel discussed the new information, and requested a reduction of the underlying sentence to six years, with two years fixed. (Supp.Tr., p.4, L.21 – p.9, L.10.) The district court denied his Rule 35 motion. (Supp.Tr., p.16, Ls.20-25.)

¹ On the face of the judgment of conviction, this amount appears to have been designated as a fee for “Supervision of Probation.” (R., p.75.)

ISSUES

1. Did the district court abuse its discretion when, without lawful authority, it imposed a fee of \$800 as "reimbursement to the Sixth District Court Fund for maintenance of the court"?
2. Did the district court abuse its discretion when it imposed a unified sentence of six years, with three-and-one-half years fixed, following Mr. Fixmer's plea of guilty to possession of a controlled substance (methamphetamine)?
3. Did the district court abuse its discretion when, in light of the new information provided, it denied Mr. Fixmer's Rule 35 motion?

ARGUMENT

I.

The District Court Abused Its Discretion When, Without Lawful Authority, It Imposed A Fee Of \$800 As "Reimbursement To The Sixth District Court Fund For Maintenance Of The Court"

Mr. Fixmer asserts that the district court abused its discretion when, at his sentencing hearing, it imposed a fee of eight hundred dollars, which it classified as "reimbursement to the Sixth District Court Fund for maintenance of the court." (Tr.Sent., p.33, L.21 – p.34, L.4.) This fee was classified in the written judgment as a fee for "Supervision of Probation." (R., p.75.) This is the only fee or fine imposed on Mr. Fixmer for which no lawful authority appears to exist.

When an exercise of discretion is reviewed on appeal, the appellate court conducts a three part inquiry. First, the district court must rightly perceive the issue as one of discretion. Second, the district court must act within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices. Finally, the district court must reach its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989). Accordingly, in order to determine whether the district court acted within the outer boundaries of its discretion and consistently with any legal standards applicable to specific choices, an appellate court must first define what the district court's boundaries of discretion are. Additionally, the appellate court must determine what legal standards are applicable to the specific choices made by the district court.

Idaho law does provide for the imposition of fees payable to district court or county justice funds that appear to be designed to provide reimbursement for court costs. Idaho Code § 31-3201A(2), in relevant part, provides for a fee of seventeen

dollars and fifty cents to be paid “by each person found guilty of any felony or misdemeanor, except when the court orders such fee waived because the person is indigent and unable to pay such fee.” Five dollars of this fee is to be deposited into the district court fund. I.C. § 31-3201A(2).² Idaho Code § 31-3201(3) provides for imposition of a ten dollar “administrative surcharge fee on each criminal case . . . for the support of the county justice fund, or the current expense fund if no county justice fund has been established” I.C. § 31-3201(3). Both of those fees were properly assessed against Mr. Fixmer. (R., p.75.)

Idaho law also provides authority for a district court to impose fees for probation, but only in cases in which supervised probation is imposed following a *misdemeanor* conviction. I.C. § 31-3201D; *see also* I.C. § 20-225 (giving authority to the board of correction to require a person on probation or parole to pay a monthly supervision fee of not more than seventy-five dollars). As Mr. Fixmer was sentenced to a term of incarceration for a felony conviction, not placed on supervised probation for a misdemeanor offense, the district court had no authority to impose an eight hundred dollar “Supervision of Probation” fee.

Because the district court did not have the lawful authority to assess a fee of \$800 as “reimbursement to the Sixth District Court Fund for maintenance of the court,” it abused its discretion when it imposed the fee in the absence of such authority, thereby acting in a manner inconsistent with applicable legal standards, which constituted an abuse of its discretion. As such, Mr. Fixmer respectfully requests that this Court vacate

² The statute goes on to state, “[f]ees not covered by this section shall be set by rule or administrative order of the supreme court.” I.C. § 31-3201A(13).

the portion of his sentence containing the order that he pay \$800 as reimbursement for "maintenance of the court."

II.

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Six Years, With Three-And-One-Half Years Fixed, Following Mr. Fixmer's Plea Of Guilty To Possession Of A Controlled Substance (Methamphetamine)

Mr. Fixmer asserts that, in light of the mitigating circumstances present in his case, including his drug addiction and sincere desire for treatment, the district court abused its discretion when it imposed a unified sentence of six years, with three-and-one-half years fixed, following his plea of guilty to possession of a controlled substance (methamphetamine).

Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. See *State v. Reinke*, 103 Idaho 771 (Ct. App. 1982). The Idaho Supreme Court has held that, "[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence." *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Fixmer does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Fixmer must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

First, Mr. Fixmer was very forthcoming and cooperative with the police when, upon being pulled over, he admitted to using and possessing methamphetamine, and told them where they would find it. (Tr.Sent., p.11, Ls.1-8; PSI, p.2.) The prosecuting attorney described Mr. Fixmer's behavior in this regard, saying, "he was extremely cooperative with law enforcement. No aggravating factors there, his behavior in that regard." (Tr.Sent., p.14, Ls.14-16.)

Second, Mr. Fixmer took responsibility for his crime when he waived his right to a preliminary hearing, pled guilty, and told the district court, "I have no one to blame for this but myself. I take full responsibility for what I've done." (Tr.Sent., p.18, Ls.7-8.) He told the PSI writer that he had relapsed after more than one year of sobriety due to "problems at work and stress and boredom," that he had attempted unsuccessfully to reach several people in his recovery plan prior to relapsing, and that when he was unable to reach them "he should have gone to a meeting, but 'I slipped up.'" (PSI, p.3.)

Third, Mr. Fixmer acknowledged having a drug problem when he told the district court, "I am an addict . . . [and] I do need help for my addictions." (Tr.Sent., p.18, Ls.8-15.) He demonstrated his sincere desire for treatment when he advised his attorney that he did not want him to recommend a probation sentence because he felt that a rider would better be able to provide him with the treatment he needed to address his addiction. (Tr.Sent., p.22, Ls.14-19.) Although he has had at least two prior instances of completing drug treatment, resulting in two stints of several months of sobriety followed by relapses, he explained to the PSI writer that things were different now that he had been placed on medication for his depression. (PSI, p.10.)

Finally, Mr. Fixmer enjoys the support of his family. He has good relationships with all members of his family. He described his parents as being "frustrated with his

choices to continue using drugs," but explained that they remain "supportive and helpful to him." His five siblings were described as "aware of his charge and supportive." (PSI, pp.5-6.)

Considering the mitigating circumstances present in his case, Mr. Fixmer respectfully requests that this Court reduce his underlying sentence to a unified sentence of six years, with two years fixed, and order that he be placed on probation, or otherwise reduce his sentence as it deems appropriate.

III.

The District Court Abused Its Discretion When It Denied Mr. Fixmer's Rule 35 Motion In Light Of The New Information Provided In Support Thereof

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994). "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id.* "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *Id.* Mr. Fixmer asserts that, in light of the new information provided in support of his Rule 35 motion, as well as the mitigating circumstances known to the district court at sentencing, the district court abused its discretion when it denied his Rule 35 motion.

Mr. Fixmer provided new information in support of his Rule 35 motion. First, he disputed being the person accused of one, and convicted of four, of the offenses in the criminal history set forth in his PSI. Rather, Mr. Fixmer asserted that his brother was

the real perpetrator of those five offenses, which consisted of a charge of driving under the influence in 2002 (disposition unknown) and convictions for (1) illegal possession of a controlled substance and possession of drug paraphernalia in 2005, and two counts of retail theft from 1990 and 1993. (Supp.Tr., p.5, L.21 – p.6, L.24; Rule 35 Information for Review Prior to Hearing (Augmentation), pp.8-9.)

Along with the corrections to his criminal history, Mr. Fixmer provided evidence that, since his sentencing, he completed the LDS Family Services Addiction Recovery 12 Step Program. (Certificate of Completion of the LDS Family Services Addiction Recovery 12 Step Program (Augmentation).) Finally, Mr. Fixmer informed the district court that the progressive sentencing model that it had relied on in imposing a three year fixed term was based on a misunderstanding of his prior imprisonment. Specifically, Mr. Fixmer noted that the thirty-three month prison sentence discussed by the district court at sentencing was not served at one time; the sentence was served in two or three increments, which together added up to thirty-three months. (Supp.Tr., p.7, L.22 – p.9, L.3.)

In light of the new information provided to the district court, when considered alongside the mitigating circumstances known at sentencing, Mr. Fixmer asserts that the district court abused its discretion when it denied his Rule 35 motion.

CONCLUSION

For the reasons set forth herein, Mr. Fixmer respectfully requests that this Court vacate the order that he pay \$800 to the Sixth District Court Fund for maintenance of the court, as it was imposed without lawful authority, and reduce his sentence to a unified sentence of six years, with two years fixed, and order that he be placed on probation, or otherwise reduce his sentence as it deems appropriate. In the alternative, he requests that this Court remand this matter for resentencing.

DATED this 17th day of January, 2013.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of January, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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SICI
PO BOX 8509
BOISE ID 83707

MITCHELL W BROWN
DISTRICT COURT JUDGE
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